Tested by these general principles, I am clearly of opinion that the libellant has not made out a case entitling him to relief.

The respondents had provided ample dock-room for unloading the vessels consigned to them if they arrived in the order in which they might reasonably be expected. By reason of slow sailing qualities or bad management on the part of her master or crew, the Hinchman did not arrive till at least six days after she was reasonably due, and respondents were not bound to keep a dock waiting for her all that time, or have one ready just one day after her arrival. He is only bound to furnish him a dock in a reasonable time after his arrival, and under the evidence in this case, I do not think the delay from the 17th to the 21st unreasonable.

The city had, only seven days before the arrival of this vessel, been visited by one of the most destructive fires ever known, destroying nearly half of its docks, two-thirds of its stores and warehouses, and rendering one-third of its inhabitants homeless. I deem this alone such an intervention of unforeseen circumstances as excused the delay which occurred, admitting that under ordinary circumstances the respondents would have been bound to furnish the vessel with a dock within one day after notice, there were extraordinary circumstances controlling all persons doing business in this city at that time; to such extent, at least, as absolves respondent from the consequences of the delay charged in this libel.

Libel dismissed at libellant's costs.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MARYLAND.[1]
SUPREME COURT OF PENNSYLVANIA.[2]
SUPREME COURT OF VERMONT.[3]

ACTION.

Variance.—A contract was signed "Wolf Creek Co., per J. K. Siegfried, Supt., [SEAL]" (a scroll seal); and also with the names and seals of the other parties who were individuals. *Assumpsit* was brought against the company for breach of the contract: the declaration was on

[1] From J. Shaaff Stockett, Esq., Reporter; to appear in 37 Md. Reports.
[2] From P. F. Smith, Esq., Reporter; to appear in 71 Pa. St. Reports.
[3] From J. W. Rowell, Esq., Reporter; to appear in 45 Vt. Reports.

a parol contract; the written contract was given in evidence without objection. *Held*, to be a waiver of the objection that the instrument was a specialty: *Wolf Creek Coal Co.* v. *Schultz*, 71 Penn.

Such variance can be taken advantage of only when the evidence is offered: *Id.*

To take advantage of the form of action afterwards, the defendants should have approved affirmatively that the seal was the corporate seal: *Id.*

Bills and Notes.

Competency of the Drawer of a Note to testify for the Plaintiff in a suit thereon by the Endorsee against the Endorser—When notice of demand on the Maker of a Note, and of his default, is not necessary to bind the Endorser.—In a suit upon a promissory note by the endorsees against the executrix of the endorser, the maker of the note is a competent witness for the plaintiffs, to prove that at the time the deceased endorsed the note, he was indebted to the witness in an amount exceeding the amount of the note, and that the witness owed the plaintiffs the sum mentioned in the note, and that it not being convenient for the deceased to pay the money he owed the witness, it was agreed between them that the deceased should endorse the note to be given to the plaintiffs, and that he would pay it at maturity: *Schley, Executrix*, v. *Merritt*, 37 Md.

In an action against an executrix, by the endorsees of a promissory note, drawn payable to the order of her testator, and by him endorsed, proof of notice to him of demand upon, and non-payment by, the maker of the note, is not necessary to fix the responsibility of the defendant, it being shown that the deceased endorser agreed with the maker to pay the note at maturity absolutely as his own indebtedness: *Id.*

Corporation.

Liability of Director.—Directors in a stock corporation, as to the stockholders, are not technical trustees, but are as mandataries, and are bound to apply no more than ordinary skill and diligence: *Spering's Appeal*, 71 Penn.

Directors are not liable for mistakes of judgment, although so gross as to appear absurd, if honest and within the scope of their powers: especially where acting under direction of legal counsel: *Id.*

Directors are responsible to the stockholders for losses from fraud, embezzlement, wilful misconduct, breach of trust: gross inattention or negligence, by which fraud has been perpetrated, by agents, officers or co-directors: *Id.*

Subscription Paper—Estoppel.—On the 19th of January 1869, the defendant, a resident of Montpelier, subscribed for 100 shares of the capital stock of the plaintiff corporation, of $100 each. At a legal meeting of the commissioners of said corporation, of whom the defendant was one, held December 20th 1869, the defendant, in presence of said commissioners, annexed the following written condition to his subscription: "Condition that good and responsible individuals in Montpelier subscribe fifty thousand dollars within one year from above date, and a list of subscribers, and amount of each, given me January 19th

1870." *Held*, that the true meaning of said condition was, that the amount of the defendant's subscription was to be counted towards the $50,000 named therein: *Montp. & W. R. R. Co.* v. *Langdon*, 45 Vt.

At said meeting, after the condition was annexed as aforesaid, the defendant agreed that, if the plaintiff would procure $40,000 of subscriptions from individuals in Montpelier, it should be a compliance with said condition; and thereupon said commissioners accepted the defendant's subscription, with said condition annexed thereto. The plaintiff thereafterwards, and before the time mentioned in said condition, relying upon the defendant's subscription and his said agreement, at great trouble and expense, procured from good and responsible individuals in Montpelier, subscriptions to the amount of $40,700, besides the defendant's subscription, whereof the defendant was duly notified. *Held*, that the defendant was thereby estopped from claiming that by the terms of said condition the amount of his subscription was not embraced in said sum of $50,000: *Id.*

Covenant.

Sealing by One where Instrument was intended to be sealed by Both — Who is bound.—If two parties enter into an indenture or agreement intended to be signed and sealed by both, but it is signed and sealed only by one, it will be the covenant of him who signed and sealed it; and the only exception to this rule occurs in cases of indentures of lease, and in respect to those covenants of the lessee which are annexed to the term, or depend on the interest therein, and which do not bind the lessee unless the lessor has also executed the indenture: *W. Md. R. R. Co.* v. *Orendorff*, 37 Md.

Damages.

Stipulated Damages—Penalty.—By contract plaintiffs agreed to furnish defendants *all* the timber they should require at their coal-mines, they to pay at the rate of eighteen cents per ton for all the coal mined, and should the tonnage during the year not amount to 75,000 tons, the defendants to pay the difference between the amount shipped and 75,000 tons at the rate of eighteen cents per ton. *Held*, the price agreed on by the parties for the fulfilment of the contract was eighteen cents per ton for 75,000 tons: *Wolf Creek Coal Co.* v. *Schultz*, 71 Penn.

Eighteen cents on the difference between the amount delivered and 75,000 tons, were stipulated damages, not a penalty: *Id.*

Whenever the stipulation is a measure to determine a damage which would otherwise be uncertain and difficult to ascertain, it is a liquidation of damages and not a penalty: *Id.*

Measure of.—Garsed contracted to lease Turner a dye-shop, furnish him work, &c., Turner to put in fixtures, which he did, and was ready to perform the work. In a suit by Turner for breach of contract, no points being presented, the court charged, "if the contract was broken by the defendants, the plaintiff is entitled to be put in the same position, pecuniarily, as he would have been if the contract had been kept, regard being had to the fact that the plaintiff soon afterwards obtained other employment: *Held*, not to be error: *Garsed* v. *Turner*, 71 Penn.

DEBTOR AND CREDITOR. See *Surety.*

EQUITY.

Pleading—Scire Facias to revive a Judgment—Demurrer—Judgment Lien—Vendor's Lien—Practice in Equity—How a Person may become a Party to Proceedings in Equity—Who may not impeach the Validity of a Decree in Equity—Purchaser under a Decree in Equity.—To a *scire facias* issued against the terre-tenants of T. to revive a judgment recovered against him by the plaintiffs, it was pleaded that before the issuing of the *scire facias* one of the defendants filed a bill in equity to enforce a vendor's lien which she held and claimed against all the real estate of T.; that said lien had existed and attached long before the obtaining of the plaintiff's judgment; that said T. appeared and answered the bill, and a decree was passed for the sale of said real estate, and the same was sold by a trustee appointed by the court, and bought and paid for by the defendants, to whom it was duly conveyed. To this plea the plaintiffs replied, admitting the proceedings in equity to sell the real estate of T., as stated in the plea, but averring that they were not made parties to such proceedings; they denied that the complainant in the equity suit held a vendor's lien on *all* the real estate of T., and averred that their judgment recited in the *scire facias* was a lien upon his real estate which was purchased by the defendants. To this replication the defendants demurred. *Held:* That as the defendants by their demurrer admitted that the plaintiffs were not made parties to the proceedings in equity, and that the vendor's lien did not attach to *all* the real estate of T., the decree and sale thereunder did not operate as a bar to the *scire facias*, and the defendants' demurrer to the plaintiffs' replication could not be sustained: *Farmers' Bank of Maryland* v. *Thomas*, 37 Md.

A person may become a party to proceedings in equity and be bound thereby, by appearing to the suit and filing his claim, and having an opportunity of sustaining it by evidence, and of appealing from the order of the court in regard thereto: *Id.*

A party who comes into court seeking payment of his claim out of the proceeds of land sold under a decree, will not be allowed to impeach the validity of the decree in a subsequent proceeding; nor will he be permitted to enforce the payment of the same claim against the land in the hands of a purchaser: *Id.*

ESTOPPEL. See *Corporation; Equity.*

EVIDENCE. See *River.*

Whole Conversation.—In action for timber delivered, a witness for plaintiffs, on cross-examination, said in answer to defendants' question, that he had told plaintiffs not to deliver any more timber, and asked them to cancel the contract: the plaintiffs might properly ask him to give the whole conversation: *Wolf Creek Coal Co.* v. *Schultz*, 71 Penn.

This rule obtains whether the part of the conversation is brought out by the direct examination of the party's own witness, or cross-examination of his adversary's: *Id.*

Irrelevancy—Competency of Witness.—A general objection to the

admission of evidence will not avail unless it appear that the evidence was irrelevant or inadmissible for any purpose: *Garsed* v. *Turner*, 71 Penn

The *competency* of a witness cannot be questioned under a general objection to evidence: *Id.*

EXECUTOR.

Settlement of Executor's Account—Presumption after twenty years—Rebuttal—Statute of Limitations—Trust Funds—Liability of Trustee using the Trust Funds in his own Business.—After 21 years from the grant of letters, an administrator or executor may answer to a citation to account or distribute, the lapse of 20 years since he was liable to account, &c.; but the presumption of settlement may be rebutted by proof that *in fact* he has neither accounted nor distributed: *Norris's Appeal*, 71 Penn.

Letters were granted to an executor in 1842; in 1865 a citation was issued under which he filed an account, showing receipts and payments in each year, and that part of the estate remained in specie. *Held*, that the presumption of settlement was rebutted: *Id.*

Balances remained in the hands of the executor from year to year, the money being deposited in bank to his private account, and used for his private purposes. *Held*, that he was chargeable with simple interest: *Id.*

An accountant may be charged as profits with more than compound interest when he has used the money; and be punished by disallowing commissions, &c.: *Id.*

An executor invested money of the estate in his own name, in stock at a low rate; the stock rose in price. *Held*, that he was liable for the dividends received, and the market value of the stock at the time of the decree: *Id.*

The purchase constituted the executor a trustee of the estate, and his possession was that of the *cestui que trust: Id.*

Such possession of the stock by the executor was not adverse, the executor having done no unequivocal act, denying the right of the *cestui que trust*, and the Statute of Limitations did not apply directly or by analogy: *Id.*

Investment of trust funds in a trustee's individual name is concealment: *Id.*

Imperfect information from a trustee as to funds invested in his name, if calculated to give a false impression, is concealment: *Id.*

Where a trustee speculates with trust funds, he may be held to profits if the investment has been successful; interest if disastrous: *Id.*

When trust funds can be traced into a particular investment, it belongs to the *cestui que trust* if he so elect: *Id.*

An executor with funds of his own and of the estate purchased stocks; when the investment with trust funds could not be discriminated, the *cestui que trust* might select the most profitable investments as having been made for the estate: *Id.*

FRAUDS, STATUTE OF. See *Sale.*

GROUND-RENT.

Covenants for—Redemption of.—A ground-rent was reserved to Parry, the grantee covenanting, for himself and his assigns, to pay to Parry, his heirs and assigns, the principal after ten years. *Held*, that an alienee of Parry, after the ten years, might maintain covenant against the alienee of the grantee: *Springer* v. *Phillips*, 71 Penn.

After the ten years, the owner of the rent continued to receive it; the right to demand the principal did not thereby lapse and the rent become irredeemable after that time: *Id.*

Such rent will not be held irredeemable unless the intent of the parties to the deed is very clear to make it so: *Id.*

The policy of the law is to unfetter lands and make them freely alienable: *Id.*

Parry covenanted that on the payment of the principal the rent should be extinguished, &c., and that he, his "heirs and assigns," would at the cost of the grantee, "his heirs and assigns, execute" a release and discharge of the rent to the grantee, "his heirs and assigns." *Held*, that the release was to be prepared by the grantee and tendered for execution to the owner of the rent: *Id.*

The action for the principal was a demand; the owner should prepare the release and bring the money into court; his rights would there be protected by a proper order: *Id.*

In this case the Supreme Court, in affirming the judgment below for the principal of the rent, directed that the owner of the land have leave to file in court a release, to be executed by owner of the rent and be delivered to the owner of the land on payment of the principal, and on failure to file the deed in thirty days, execution might issue: *Id.*

INSURANCE.

Mortgage of Ship not an Assignment of Policy.—An insurance company executed to Trask a marine policy on a ship, "for account of whom it may concern, loss if any, payable to assured or order; no assignment of the policy to be valid "unless the consent of the insurers be first obtained." He mortgaged the ship to Bell, and covenanted to keep her insured, assigned the policy in blank and delivered it to Bell as collateral; a partial loss having occurred, *Held*, that Bell was entitled to recover from the insurers in preference to a subsequently attaching creditor of Trask: *Ins. Co. of Penn.* v. *Phœnix Ins. Co.*, 71 Penn.

The transaction was an equitable transfer of the right to receive the money, not an assignment of the policy: *Id.*

The relation of insurer and insured is one of confidence; a stranger cannot become a party to the agreement without the insurer's consent: *Id.*

The premium note was not paid by Trask, and after the loss the insurer settled with Bell; the amount of the note being allowed to be set off, the condition against assignment which was for the insurer's benefit was thus waived: *Id.*

LIMITATIONS, STATUTE OF. See *Executor.*

Malicious Prosecution.

Evidence—How far Judgments conclude parties to the Action—Punitive Damages—When a Defendant is relieved from liability, by having acted under the professional advice of his Counsel—When Malice may be inferred from want of Probable Cause—Definition of Probable Cause.—In an action for malicious prosecution in having the plaintiff indicted and tried upon a charge of obtaining money and stock under false pretences, a witness for the defence, a lawyer, in his examination in chief, gave certain testimony, the object of which was to rebut the presumption of malice, by showing that the defendant in instituting the prosecution for which he was sued, had proceeded in good faith, upon the advice of counsel, learned in the law, given upon a full representation of the facts. Upon cross-examination the plaintiff propounded to the witness the following question, stating at the same time that its object was to ascertain whether all the facts had been communicated to him: "You have stated that with all the facts before you, you advised the defendant that the plaintiff had been guilty of obtaining money under false pretences; please state what were the facts upon which that advice was based?" To this question and the admissibility of the matters inquired of, the defendant objected, for the reason, among others, that the correctness of the opinion of the witness was not in issue, nor were the reasons or grounds on which he based it, but only the fact that he had formed and expressed it to the defendant: *Held*, That the question was proper, the object being to test the good faith of the defendant, by ascertaining whether he or his agents had disclosed all the facts bearing on the guilt or innocence of the accused, in his possession, in his consultation with his legal adviser, and the answer to the question was evidence for the jury: *Cooper* v. *Utterbach*, 37 Md.

A suit in equity was instituted in Virginia, the object of which was to obtain a decree for the sale of certain land conveyed in trust to secure the complainant's debt, being a loan to the respondent, and an appropriation of the proceeds of sale in discharge of the same. The respondent in his answer charged that the complainant cheated him in the transaction of the loan, and pleaded usury as well as fraud. Issues were directed by the court to a jury to inquire whether fraud or usury had been practised by the complainant on the defendant; the jury found for the complainant; and the court thereupon decreed that he was entitled to have the real estate sold for the satisfaction of his debt. Some time after the equity suit in Virginia was instituted, the respondent was indicted in the Criminal Court of Baltimore city, at the instance of the complainant, for obtaining money and stock from him by false pretences —the charge growing out of the transaction of the loan. The accused was tried, acquitted and discharged, and thereupon brought a suit against the complainant for malicious prosecution. At the trial of this action the plaintiff read certain proceedings and depositions from a duly certified transcript of the record of the equity suit in Virginia. Both parties, in fact, read from it without objection. The defendant contended that the questions decided between himself and the plaintiff in the equity suit in Virginia were to be taken as finally settled and concluded between them, and no longer open to controversy, and the court having determined in that case that the transaction between them was

altogether fair on the part of the defendant, and not tainted by fraud or usury, it was no longer competent for the plaintiff to argue, or for the jury to find otherwise than as the court had pronounced it. *Held:* That the matter directly in issue in the equity case in Virginia, was the right of the complainant to a lien on certain lands therein, in preference to all other creditors, and to have said lands sold, and to the extent of that issue the record was conclusive. But that the record was not offered or used by either side, merely to prove the fact of the decree; nor were the depositions used to prove what had been testified to by any particular witness in the cause who had since died or become disqualified; but it would seem they were used by each side as a substitute for the oral examination of witnesses not then before the court, who had been examined in the equity case on the several matters involved therein, which were also the subject of investigation in the criminal prosecution and in the present action for malicious prosecution; they thus became original testimony, on which the counsel were at liberty to make such comments, and the jury to form such conclusions as the facts warranted, without regard to the final decree in the case: *Id.*

If in an action for malicious prosecution, the jury find that the prosecution originated without probable cause and in malice, they may legitimately, if not necessarily, find from the same premises that the prosecution, if pursued, was persisted in for some private end, as the want of probable cause and malice exclude all public motives, and so finding they may give punitive damages: *Id.*

In an action for malicious prosecution, it is not sufficient, in the absence of probable cause, for the defendant, in order to relieve himself from liability, to show that he acted *bonâ fide*, and without malice, under professional advice; the advice must be based upon a full disclosure of all the facts in the defendant's knowledge, or which with due diligence he might have known. The omission of any material fact, by design or otherwise, will render the advice nugatory: *Id.*

In an action for malicious prosecution, if it appear that the defendant aided and assisted in procuring the arrest and prosecution of the plaintiff, and aided in the prosecution, and that the plaintiff was indicted, tried and acquitted, and there were no circumstances connected with the transaction out of which the criminal prosecution arose, which could induce a reasonable, dispassionate man to believe the plaintiff was guilty of the charge made against him, and to undertake such a prosecution from public motives, then there was no probable cause for the prosecution, and the jury might infer, in the absence of sufficient proof to satisfy them to the contrary, that the prosecution was malicious in law: *Id.*

Probable cause means the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the defendant in an action for malicious prosecution, that the plaintiff was guilty of the crime for which he was prosecuted: *Id.*

PLEADING. See *Action.*

RIVER.

Navigable Stream—Rights of Public in the Highway superior to right of City to use Water for Manufacturing, &c.—By Act of April

9th 1807, Kennedy was authorized to dig a race to his mill at the Falls of Schuylkill, and lead so much water of the Schuylkill as might be necessary for machinery, &c., with the proviso that he should not obstruct the navigation, and if the city should wish to erect machinery to conduct water to it, such right was reserved, the city to be liable to pay Kennedy his expenses, and 20 per cent. on conveyance being made of the whole of his right. *Held*, that the act granted a mere private right to Kennedy, and the proviso in favor of the city gave her no right to the water which would impair the navigation: *City of Phila.* v. *Gilmartin*, 71 Penn.

The rights of the public for navigation of the Schuylkill are superior to those of the city, under the Act of 1807, and her contracts with the Schuylkill Navigation Company: *Id.*

In a time of drought the water of the Schuylkill was so used by the city as to prevent navigation. In an action by a boat-owner detained by this use, *Held*, that the acts and declarations of the mayor, councils, engineer, and other officers in relation to this matter were evidence against the city: *Id.*

The city was a vendor of water to her citizens, &c., the officers having direction of the waterworks, and the city stand in the relation of principal and agent: they are not officers performing municipal functions merely; the city is liable for their negligence and irregularities in the scope of their duties: *Id.*

The right of the city to draw water for purposes of manufacturing, &c., and also for baths, &c., as well as for propelling power, is subordinate to the right of navigation: *Id.*

Sale.

Statute of Frauds.—When anything remains to be done by either or both, the parties to a contract of sale, before delivery, the title does not pass: *Gibbs* v. *Benjamin*, 45 Vt.

So inflexible is this rule, that when the property has been delivered, if anything remains to be done by the terms of the contract before the sale is complete, the title to the property still remains in the vendor. The contract must be *executed*, to effect a complete sale: *Id.*

The mere delivery of goods to the vendor, is not sufficient to take a case out of the Statute of Frauds; he must accept and receive them: *Id.*

Subscription Paper. See *Corporation.*

Surety.

Guaranty—Debtor and Creditor—Application of Payments—Diligence.—Davis was indebted to Sherman for printing; he refused to do more without a guaranty. Woods agreed to "guaranty to Sherman the contract made by him with Davis to the amount of $10,000." Afterwards, Davis paid money to Sherman, without directing any appropriation. *Held*, that Sherman might apply it to the debt due before the guaranty: *Woods* v. *Sherman*, 71 Penn.

To recover against a guarantor, the creditor must prove due diligence against the debtor or his insolvency, so that pursuit would be fruitless. He need not prove both: *Id.*

An execution was issued against the debtor, suit was brought against the guarantor; two days afterwards the execution was returned "*nulla bona.*" *Held*, primâ facie evidence of due diligence: *Id.*

Reasonable diligence is a question for the jury: *Id.*

Ex vi termini a guaranty of a contract is a concurrent act and part of the original: *Id.*

Words of Guaranty.—Coulter executed this paper: "Due on demand, &c., to Bayard or order, 100 shares S. N. Stock," on which Ashton endorsed: "I hereby become security of Coulter, for the fulfilment of the within obligation." *Held* to be an original undertaking by Ashton, and Bayard might recover without proving diligence to pursue Coulter: *Ashton* v. *Bayard*, 71 Penn.

The dictum that the contract stated in *Gilbert* v. *Henck*, 6 Casey 205, was a guaranty, overruled: *Id.*

Trover.

Conditional Sale—Officer—Damages.—The plaintiffs sold and delivered a wagon to one M. for $120, to be theirs till paid for. The defendant, as constable, attached the same as the property of M., on a writ in favor of P. & Co. against him. The wagon was stolen from the defendant within three days after the attachment, and never afterwards found. At the time of the attachment, $60 of the purchase-money remained unpaid. Soon after the attachment, the plaintiffs gave notice of their claim to the defendant, and to P. & Co., but no tender, or offer, of the amount unpaid, was ever made to the plaintiffs. Judgment was rendered against M. in said suit, and execution issued within thirty days. The value of the wagon at the time of the attachment, was $95. *Held*, that the defendant was liable in trover for the full value of the wagon, and could not discharge himself by showing a loss thereof without his fault: *Duncan* v. *Stone*, 45 Vt.

Trustee. See *Corporation; Executor.*

Vendor and Purchaser. See *Sale.*

Misrepresentations.—Weist, without inspection, bought from Hickcox and Coryell, the owners, silver mines, upon their representation that they would yield a certain amount; the contract to be void if Weist should not approve the report of a selected assayer. After his reports Weist paid a large part of the purchase-money; on working the mine, by Weist, the product was only one-third of the representations. *Held*, That Weist was liable for the remainder of the purchase-money, unless the misrepresentation was intentional: *Weist* v. *Grant*, 71 Penn.

Weist having bargained for the report of an assayer before being bound by the contract, and having acted on it, and there being no collusion or fraud, he was estopped from alleging misrepresentation in the inception of the contract: *Id.*